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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 334

STOCKARD STEAMSHIP CORPORATION, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners named below[1] pray that, if this Court should grant the petition of the United States for a

[1] The cases below were decided below *sub. nom. American-Foreign Steamship Corp., et al.* v. *United States.* In Docket No. 138 the United States has petitioned for certiorari in these cases to review the single question of Judge Medina's eligibility, after retirement, to continue to sit with and participate in the decision of the *en banc* court. The instant Petitioners are Respondents in Docket No. 138: Stockard SS Corp.; A. H. Bull SS Co.; Dichmann, Wright & Pugh, Inc.; A. L. Burbank & Co., Ltd.; North Atlantic & Gulf SS Co.; Polarus SS Co., Inc.; New York & Cuba Mail SS Co.; T. J. Stevenson & Co., Inc.; Luckenbach SS Co., Inc.; Blidberg Rothchild Co., Inc.; Fall River Navigation Co. A conditional cross-petition (No. 322) has been separately filed by American-Foreign Steamship Corp.

writ of certiorari in Docket No. 138, a writ of certiorari also issue to review the questions presented to the United States Court of Appeals for the Second Circuit as to which the United States has not sought review.

OPINIONS BELOW

The opinion of the Court of Appeals on rehearing *en banc* dated July 28, 1958, and its opinion denying the petition for further rehearing *en banc,* dated March 26, 1959, together with the opinion of the three-judge panel of the Court of Appeals, dated September 25, 1957, which the *en banc* court ordered withdrawn, are all reported at 265 F. 2d 136 and are set forth in Petitioners' Appendix in Docket No. 138 (hereinafter "Docket 138 App.") pp. 14-48. The opinion of the United States District Court for the Southern District of New York (Palmieri, D. J.) covering eleven of the libels here involved is reported as *A. H. Bull Steamship Co.* v. *United States,* 141 F. Supp. 58. The opinion of the United States District Court for the Southern District of New York (Herlands, D. J.) covering the three other libels here involved is not reported, but it is set forth in footnote 2 to the opinion of the three-judge panel reported at 265 F. 2d 136, 140, and appears in Docket 138 App. p. 16.

JURISDICTION

The opinion and judgment of the Court of Appeals on rehearing *en banc* was entered July 28, 1958 (265 F. 2d at 144). The United States filed a petition for further rehearing *en banc,* which was denied by Opinion and Order dated March 26, 1959 (265 F. 2d at 153). An order extending Petitioners' time to file this cross-petition, to and including August 24, 1959, was entered

herein by Mr. Justice Harlan on June 10, 1959 (App. A, *infra*, p. 1a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(a) Under a contract of charter drafted by the United States Maritime Commission[2] providing that Petitioners were to make preliminary payments of additional charter hire "in such manner and amounts as may be required" by Maritime, subject to refund upon completion of Maritime's final audits of Petitioners' accounts, did the court below correctly decide that Petitioners' causes of action accrued when, upon final audit, Petitioners demanded and were refused refunds of alleged overpayments; (b) were Petitioners' payments, made in accordance with the aforesaid provision of the charters, "voluntary payments" and thus unrecoverable; (c) did the reciprocal obligations prescribed by the charter and the cross payments and credits in the accounts between Petitioners and Maritime make them mutual open accounts in respect of which causes of action accrued as of the date of the last entry.

STATUTE INVOLVED

The Suits in Admiralty Act, 46 U.S.C. 745, provides in relevant part:

> That suits as herein authorized may be brought only within two years after the cause of action arises . . .

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[2] The Maritime Commission and its successor, the Maritime Administration (Reorganization Plan No. 21 of 1950, 64 Stat. 1273, *et seq.*) are sometimes hereinafter referred to as "Maritime".

STATEMENT

The Merchant Ship Sales Act of 1946 (60 Stat. 41, 50 U.S.C. App. 1738, *et seq.*) authorized the chartering of Government-owned vessels to private companies on terms prescribed by the Act. Section 5 of that Act incorporated Section 709(a) of the Merchant Marine Act, 1936 (49 Stat. 2010, 46 U.S.C. 1199(a)).[3] The latter section required each charter to provide that, in addition to basic charter hire, the charterer should pay additional charter hire in the amount of 50 percent of profits in excess of a specified return on capital.

The Maritime Commission published a proposed form of Ship Sales Act charter which required payment of additional charter hire on a sliding scale ranging from 50 percent to 90 percent of the charterers' profits in excess of the return on capital. Industry-wide protest was made as to this provision of the charter on the ground that the profit sharing rates exceeded the 50 percent rate prescribed by the Ship Sales Act (Blidberg Rothchild Co., Inc. v. United States, District Court Record, page 51, hereinafter "Blidberg D. C. Rec. . . .").

Maritime's terms were accepted, subject, however, to explicit provision that the charterers' payments were

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[3] Section 709(a) provides:

Every charter made by the Commission pursuant to the provisions of sections 1191-1204 of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

to be preliminary and tentative, and subject to adjustment upon completion by Maritime of its final audit of the charterers' accounting.[4]

Other important disputes, not mentioned in the Government's petition in Docket No. 138, involving interpretation of the charter, Maritime's regulations and the statute, arose during the course of operations under the charters.

One major dispute was whether profits and losses should be accounted for on a "cumulative" basis, *i.e.*, whether the words "cumulative net voyage profit" in Section 709 permit losses not only to be carried forward against later profits (which the regulations of Maritime permitted), but also to be carried back to offset earlier profits, in computing the amount of additional charter hire.

Another controversy was whether Section 709 permits Maritime to require the charterers to divide the calendar year 1947 into two accounting periods as of September 1, 1947, although that section provides that

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[4] Clause 13 of the charters provided in relevant part:

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner; *provided*, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterers as may be required.

additional charter hire shall be paid on the basis of "calendar year" operating results.

Numerous other questions of interpretation of the statute, the contract, and the accounting regulations are variously mentioned in the libels and are summarized in the decisions below (Pet. App. pp. 31-32).

Upon audit of their accountings Petitioners demanded refund of alleged overpayments. Maritime rejected their claims and they brought suit. Each libel was filed within two years of audit.

Respondent filed exceptions and exceptive allegations asserting that each libel was time barred because filed more than two years after redelivery of the last vessel under the charter. The district court upheld the exceptions and dismissed the libels. The court below reversed the dismissals (except as to Blidberg Rothchild Co., Inc., discussed *infra*),[5] holding "that the rights of the parties to these charters, so far as additional charter hire is concerned, are governed by Clause 13" (Docket 138 App. p. 29) and that "the text of Clause 13 is an adequate, *prima facie*, showing of jurisdiction in the absence of pleading and proof by the Government that the libelants' interpretation of Clause 13 is incorrect" (*ibid*, p. 31).[6]

[5] The court also dismissed, as untimely, the interlocutory appeal of Diehmann, Wright & Pugh, Inc.

[6] On reargument *en banc*, Respondent for the first time argued that the "final audit" specified in Clause 13 means "each annual audit". This argument ignored the word final. The court held that this issue could be presented to the district court "after giving the Government opportunity to raise such issues of fact as may be desired" (Docket 138 App. p. 30). Respondent, however, regards this issue as inconclusive. In its petition for further rehear-

The sixth cause of libel of Petitioner Blidberg Rothchild Co., Inc. (Blidberg D. C. Rec. 10) seeks reimbursement of expenditures to repair latent defects in one of the chartered vessels. Payment or rejection of the claim would affect Blidberg's expenses and profits and, consequently, its liability for additional charter hire. The court, affirming the time bar dismissal of this cause, held that this dispute is not one over additional charter hire and is not covered by Clause 13, although "it may be necessary to litigate this expense for its impact on a proper computation of Blidberg's additional charter hire" (Docket 138 App. p. 32).

Respondent petitioned for further rehearing *en banc* and its petition was denied March 26, 1959 (*ibid*, pp. 44-48).

REASONS FOR GRANTING THE WRIT

I. The Need to Settle the Time Bar Issue

Petitioners seek review of the decision below (which was in their favor except for the latent defects issues, discussed below) because of urgent need to settle the time bar question which Respondent's petition for certiorari in Docket No. 138 would leave unresolved.

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ing *en banc*, p. 7, n. 3, it points out that the date of *final* annual audit is the same as the date of the final audit covering the entire period of the charter:

> The opinion omits to state that this subordinate verbal controversy has little possibility of effect on any of these cases because there is the same necessary ten-year delay in each year's final audit (whether the first or, as libelants insist, the last is referred to), and the Government has contended throughout that any possible right to bring suit accrues at once at the time of payment.

Interposition of the time bar issue thus far has delayed judicial consideration of the merits of the disputes between Petitioners (and other charterers) and Respondent for almost six years.[7] It has enabled Respondent, which claims substantial sums as unpaid additional charter hire from Petitioners and other charterers, to avoid filing cross-libels and, relying on its possible shelter from time bar, to defer the bringing of independent suits therefor.[8]

In addition to the cases here involved, there are more than 20 other suits for the recovery of overpayments of additional charter hire pending in various courts of the United States.[9] The first of these suits (Sprague Steamship Corp., No. A. 53-80F, E.D. Mass.) was filed December 23, 1953. The time bar issue has been briefed and argued in cases in the Southern District

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[7] In only one case have the merits been reached. *Dichmann, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D.N.Y. 1956) There the Government sought dismissal of the cause of libel based on the sliding scale profit sharing dispute, as failing to state a claim on which relief could be granted. Judge Dimock overruled the exceptions and held that the additional charter hire terms in the charter were unlawful and that Maritime had exacted charter hire in excess of the amount permitted by statute. The Government thereafter filed time bar exceptions as to which the district court is withholding decision, awaiting the decision in the cases at bar.

[8] Even if all claims for additional charter hire by Petitioners and other charterers were held to be time barred, that would not dispose of the controversies. Presumably, Respondent ultimately will seek adjudication of its claims against the charterers.

[9] A list of these cases and the forums in which they are pending is set out in Appendix B, *infra*, p. 2a.

of New York,[10] the District of Delaware,[11] the District of Maryland[12] and the Northern District of California.[13] Each case is awaiting final decision in the cases at bar. In each case, approximately two years have already elapsed since the respective dates of argument shown in parenthesis in the footnotes.

Settlement of the time bar issue would obviate the further expenditure of much time and effort by courts and counsel.

Resolution of the issue is also called for because of the suggestion in the dissenting opinion below that the majority holding might not be followed:

> It is made by a minority only of the active judges, against the expressed view of other judges who may ultimately prevail. An overruling so deficiently based can only mislead the unwary. (Docket 138 App. p. 37, n. 3).

II. The Court Below Properly Overruled the Time Bar Exceptions

The district court dismissals were erroneous because, to begin with, they violated the basic principle that

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[10] *Dichmann, Wright & Pugh, Inc.* v. *United States*, No. A. 182-397 (1/3/57).

[11] *Blidberg Rothchild Co., Inc.* v. *United States*, No. A. 1758 (12/19/57); *Marine Transport Lines, Inc., and Marine Navigation Co., Inc.* v. *United States*, No. A. 1747 (12/19/57); *Pacific-Atlantic Steamship Co.* v. *United States*, No. A. 1722 and No. A. 1737 (12/19/57); *South Atlantic Steamship Line* v. *United States*, No. A. 1735 and No. A 1757 (12/19/57); *Smith-Johnson Steamship Corp.* v. *United States*, No. A. 1755 (12/19/57).

[12] *Black Diamond Steamship Corp.* v. *United States*, No. A. 3885 (12/13/57).

[13] *Coastwise Line* v. *United States*, No. A. 27398 (11/15/57); *Pacific Far East Line, Inc.* v. *United States*, No. A. 27170 (11/15/57); *Pacific Transport Lines, Inc.* v. *United States*, No. A. 27101 (11/15/57); *Pope & Talbot* v. *United States*, No. A. 27161 (11/15/57).

summary dismissals may not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". *Conley* v. *Gibson*, 355 U.S. 41, 45-6 (1957). See also *Richfield Oil Corporation* v. *United States*, 248 F. 2d 217, 225 (9 Cir. 1957); *Dunn* v. *United States*, 1950 A.M.C. 1420, 1421 (S.D. Calif.); *Warner* v. *First National Bank of Minneapolis*, 236 F. 2d 853, 857 (8 Cir. 1956), *cert. denied*, 352 U.S. 927; *Homan Mfg. Co.* v. *Long*, 242 F. 2d 645, 653 (7 Cir. 1957); *Frederick Hart & Co.* v. *Recordgraph Corporation*, 169 F. 2d 580, 581 (3 Cir. 1948).

Far from there being any doubt as to the adequacy of Petitioners' jurisdictional showing, affidavits, which were not controverted, and other evidence submitted by Petitioners overwhelmingly demonstrated not only that Petitioners and Maritime intended Clause 13 to defer all disputes until Maritime's final audit, but also, during the course of operations under the charter, consistently construed Clause 13 as having that effect. Such an agreement is altogether proper and binding on the government. *United States* v. *Ohio Oil Co.*, 163 F. 2d 633 (10 Cir. 1947); *cert. denied* 333 U.S. 833; *Dubuque Packing Company* v. *United States*, 126 F. Supp. 796 (N.D. Iowa 1954), *aff'd* 233 F. 2d 453; *Phillips-Jones Corporation* v. *Johnson*, 155 F. Supp. 378, 381 (S.D.N.Y. 1957); *Schenley Import Corp.* v. *United States*, 121 F. Supp. 646, 648 (C. Cls. 1953); *United States* v. *Seaboard Air Line Ry. Co.*, 22 F. 2d 113, 115 (4 Cir. 1927); *United States* v. *The South Star*, 115 F. Supp. 102, 106 (S.D.N.Y. 1953), *aff'd* 210 F. 2d 44.

Beyond question the court below was right in adopting the construction which Maritime, the drafter of

the charter, had undeviatingly given Clause 13. *United States* v. *Lennox Metal Manufacturing Co.*, 225 F. 2d 302, 315 (2 Cir. 1955); *American Bemberg Corporation* v. *United States*, 150 F. Supp. 355, 361 (Del. 1957), *aff'd* 253 F. 2d 691 (3 Cir. 1958), *cert. denied* 358 U.S. 827.

Petitioners made the following showing:

A. It was known at the outset that the accountings for profits or losses, tentatively shown at the time of redelivery of the vessels, would be subject to substantial change for later developed items of income and expense, foreign agents' accounts, overhead, and results of personal injury and cargo damage litigation, so that a tentative balance in favor of Maritime or the charterer at redelivery might, by the time of final audit, be turned into a balance in favor of the other party. Maritime pointed out in a letter to a charterer (Court of Appeals Record page 120a, hereinafter "C.A. Rec. . . ."). .

> . . . it was agreed that the work of liquidation due to failure of foreign subagents to clear accounts and for other reasons would *average eighteen months after the date the vessels were redelivered* . . . (emphasis supplied).

And the record shows that from time to time the balances shifted and Petitioners made payments to, and received refunds from, Maritime accordingly, in some cases as long as five years after redelivery of the last chartered vessel (Docket 138, App. p. 22).

B. The regulations, pursuant to which the charterers were to make their accountings, had not been issued when the form of charter was adopted and it was not then known when they would be issued. The first of these regulations was not issued until February 21, 1950, more than two years after redelivery of the last

vessels under some of the charters.[14] And the Comptroller General reported to Congress that Maritime's delay in issuing its accounting regulations was making it impossible to settle the charterers' accounts.[15]

Moreover, in August 1950, January 1951 and June 1951, Maritime issued retroactive amendments to its regulations which affected the charterers' additional charter hire obligations. (14 F.R. 7273, 46 CFR 299.82; 16 F.R. 551, 46 CFR 299.37-4(d), (e); 17 F.R. 5444, 46 CFR 299.37-4(f)).

C. The rule against splitting causes of action made it necessary to defer the date of accrual of the causes of action until all claims could reasonably be expected to be known. *Baird* v. *United States*, 96 U.S. 430, 432

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[14] Petitioners Bull-Insular Line, Inc. and Baltimore Insular Line (a Bull affiliate) had redelivered all vessels under Charters Nos. MCe-41733 and MCe-41897 more than two years before this date. If the redelivery date had been controlling, these charterers would have been time barred before they could have made up their accounts.

[15] For example, the Comptroller General stated in a report to Congress (H. Doc. No. 465, 81st Cong., 2d Sess., pp. 87-88):

> A more serious factor contributing to the delay, however, was the failure to resolve accounting differences with charterers and to prescribe fixed regulations under which additional charter hire was to be determined and paid. As a result, additional charter hire has been computed and paid by charterers *under tentative instructions* which require clarification and revision before final settlement can be made.
>
> To June 30, 1949, 184 charter agreements were or had been in effect, and additional charter hire of $71,708,120 had been reported tentatively by the charterers. Field audits of only a few charter accounts had been completed, and no final determinations and settlements had been made at June 30, 1949. Obviously none will be made until the proposed regulations are approved and issued by the Commission. (Emphasis supplied)

(1877); *N. Y. Scow Corp.* v. *Olsen*, 121 F. 2d 704 (2 Cir. 1941); *Myerle* v. *United States*, 33 C. Cls. 1, 21 (1897).

D. Maritime consistently construed Clause 13 as reserving all disputes.

1. Maritime issued a standard instruction to all charterers stating:

> Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is *on account* of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise. (Docket 138 App. p. 37, C.A. Rec. 163a-164a, emphasis by Maritime).

To charterers who, because of some of the very disputes here involved, questioned Maritime's demands for payment of additional charter hire, Maritime wrote letters pointing out that these disputes were anticipated by Clause 13 of the charter at the time of entering into the contracts and stating further that "in view thereof, provisions were placed in the contracts which would require the charterer to pay additional charter hire to the government on a preliminary basis with a further provision for refunding to the charterer of any

overpayments resulting from subsequent adjustments" (C.A. Rec. 117a-118a).[16]

2. Section 12(d) of the Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1745(d), required Maritime to deposit moneys received under the Act in the United States Treasury to the credit of miscellaneous receipts. Had the preliminary payments of additional charter hire been irrevocable payments they would have had to be so deposited. Instead, they were kept in a special "unearned moneys" trust account established pursuant to authorization by the Comptroller General who stated "The amounts paid out of the trust account were adjustments or refunds of 'unearned moneys' received and deposited therein". 33 Decisions of the Comptroller General 503, 504 (1954).

Maritime itself thus regarded the payments of additional charter hire as reflecting "merely an interim arrangement to cover whatever contingencies the future might define". *Rosenman* v. *United States*, 323 U.S. 658, 662 (1945). See also *Thomas* v. *Mercantile Nat. Bank at Dallas*, 204 F. 2d 943, 944 (5 Cir. 1953). Cf. *Plankinton* v. *United States*, 267 F. 2d 278, 280 (7 Cir. 1959).

E. In a suit for the recovery of overpayments of additional charter hire brought in the District Court of Delaware, the Government's brief conceded that Clause 13 reserved disputes until final audit[17] (not annual audit):

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[16] Copies of similar letters are shown at C.A. Rec. 109a-110a, 115a-116a.

[17] *South Atlantic Steamship Line, Inc.* v. *United States*, Admiralty No. 1757. The Government's statement on this point is set out in full in Appendix C, *infra*, pp. 3a-4a.

> This third cause of South Atlantic is for overpayments of $16,430.92 "under respondents' regulations". This cause of action (Arts. 21-22), like the $150 a day overhead ceiling (Art. 7), in effect merely alleges that accepting the legality of the government's contract and regulations such an amount is owing to South Atlantic upon making the necessary accounting adjustments on the final audit. . . . They [libelant's claimed adjustments] illustrate the "adjustments" on final audit under the agreement to which Clause 13 and the regulations referred as remaining open until final audit.

Respondent attempts to distinguish "adjustments under respondent's regulations" from the claims at bar. This distinction comes to naught, however, because no distinction is made in the charter or the regulations between types of claims. Moreover, many of Petitioners' claims are precisely of the character described above by Respondent (Docket No. 138, Pet. App. pp. 31-32) and all involve adjustments arising at least in part out of Maritime's regulations. This includes the sliding scale profit sharing dispute since Maritime's regulations (46 CFR 299.31(9)(1)) set forth verbatim the profit sharing terms of Section 709(a) of the Merchant Marine Act, 1936.

F. Only the hearsay *ipse dixit* of Respondent's counsel stands against Petitioners' sworn evidence. And Respondent has practically abandoned its original position that the statute of limitations began to run from the date of redelivery of the last chartered vessel.

Fragmenting the contract, Respondent's brief on rehearing asserted a variety of different dates on which the various causes of action accrued. It conceded that, where Maritime's accounting regulations were published after redelivery of the chartered vessels, the statute began to run from the date of publication (Brief on Rehearing, p. 9, n. 2). It also argued, *inter*

alia, that the causes of action arose "as each payment in excess of this statute was made" (*ibid*, p. 8).[18]

Respondent's shifting, inconsistent and unsupported arguments were insufficient to overcome Petitioners' evidence.

III. The Court Below Rightly Held That the Issue of Voluntary Payment Was Not Jurisdictional; in Any Event, the Payments Were Not "Voluntary"

None of Respondent's exceptions in the cases at bar asserted the defense of voluntary payment. The point was argued in Respondent's briefs only, and it was not properly before the court. Beyond that, the court below properly held that the issue did not go to jurisdiction. *Binderup* v. *Pathe Exchange*, 263 U.S. 291, 304-305 (1923). As pointed out below, Respondent seems to be arguing "that every issue going to the merits is jurisdictional" (Docket 138 App. p. 28, n. 5).

In any event, payments made on a preliminary basis with a reservation of the right to recovery are not "voluntary". The rule is stated in 70 C.J.S., Payment, section 144:

> A payment made to avoid delay on the condition that the difference as to the amount due shall be adjusted later is not a voluntary payment, and may be recovered as money received.

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[18] Respondent did not discuss the question of how and when a payment, on account of the profits derived from operations of a group of vessels, might become an overpayment. For example, a payment reflecting the amount due at the date it was made might become an overpayment by reason of the results of later voyages or later items of expense which reduced the charterer's profits and, consequently, its obligation for additional charter hire. On the other hand, later profits might convert it into an underpayment.

See also 70 C.J.S., section 153; *United States* v. *Ohio Oil Co.*, 163 F. 2d 633, 638 (10 Cir. 1947), *cert. denied*, 333 U.S. 833; *In re New York, O. & W. R. Co.*, 178 F. 2d 765, 766 (2 Cir. 1950); *Empire Engineering Co., Inc.* v. *United States*, 59 C. Cls. 904, 906, 907 (1924); *Replogle* v. *Ray*, 119 P. 2d 980, 48 Cal. App. 2d 291, 308 (1941); *Bailey* v. *Minge*, 77 So. 419, 420, 16 Ala. App. 269 (1917); *Carter* v. *Riggs*, 83 N.W. 905, 112 Iowa 245 (1900); *Smith* v. *Baldwin*, 187 So. 192, 237 Ala. 423, 425 (1939); *Lewis* v. *Colquitt County*, 30 S.E. 2d 801, 805-806, 71 Ga. 304 (1944); *Lobit* v. *Marcoulides*, 225 S.W. 757 (1920).

IV. The Court Below Erred in Affirming Dismissal of the Latent Defects Cause of Libel

Under Clause 2(b) of the charter[19] Respondent was liable for expenses incurred by a charterer to repair latent defects discovered after delivery of the vessels. Petitioner Blidberg Rothchild Co., Inc. asserted a claim for latent defects in its sixth cause of libel (Blidberg D. C. Rec. 10). The court below, noting that this was not a claim for the recovery of an overpayment of additional charter hire, nevertheless recognized that the claim "may indirectly affect the proper computation of Blidberg's additional charter hire" and, consequently, "it may be necessary to litigate this expense for its impact on a proper computation of Blidberg's additional charter hire even though direct recovery of the expense be time barred" (Docket 138 App. p. 32).

Affirmance of the dismissal of this cause of libel was error because, as asserted in the proposed amended libel (Blidberg D. C. Rec. 35-36), the accounts between

[19] Clause 2(b) is set out in Appendix D, *infra*, p. 5a.

the charterers and Maritime were mutual and open and the statute of limitations began to run from the date of the last entry.

Thus, under the charter itself, the charterer and Maritime both undertook reciprocal obligations. The charterer was obliged to pay basic charter hire (Clause 12), additional charter hire (Clause 13), the value of consumable stores and fuel oil supplied by Maritime at delivery of the vessels (Clauses 4 and 5), the value of equipment shortages at redelivery (Clause 6), and the cost of repairing defects noted on redelivery survey (Clause 15). Maritime was required to pay expenses incurred in repairing latent defects (Clause 2), overpayments of additional charter hire (Clause 13), the value of consumable stores, fuel and equipment supplied by the charterer at redelivery (Clauses 4, 5 and 6), and the cost of redelivering vessels at ports other than the ports of delivery (Clause 14).[20] Accordingly, cross-debits, credits and payments covering various reciprocal obligations are shown in Blidberg Rothchild's accounting to Maritime (Docket 138, App. p. 22). The last item in the account occurred in 1956, the year in which the libel was filed.

Judge Learned Hand, dissenting in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, 347-348, affirmed on reargument, 230 F. 2d 75, cert. denied as to time-bar (affirmed as to admiralty jurisdiction), 351 U.S. 976, was of the opinion that the accounts between the charterers and Maritime were "mutual" solely on the basis of Respondent's obligation to make the additional charter hire adjustments upon final audit. The majority in that case rejected his view upon the ground that

[20] The clauses of the charter referred to above are set out in relevant part in Appendix D, *infra*, pp. 5a-9a.

there had been no showing of reciprocal obligations. That court's attention, however, had not been called to the series of reciprocal obligations shown in the record here.

The accounts being mutual, the latent defects cause of libel was not time-barred. *Judson* v. *Buckley*, 130 F. 2d 174, 183 (2 Cir. 1942), *cert. denied*, 317 U.S. 679; *Haines* v. *Phillips Petroleum Co.*, 58 Supp. 777, 780 (W.D. Okla. 1944).

CONCLUSION

Petitioners, therefore, respectfully request that if a writ of certiorari is issued in Docket No. 138, this Court's review should also extend to the other issues presented herein, so that those issues, which affect the many pending similar cases, may be resolved.

Respectfully submitted,

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August 22, 1959

APPENDIX A

Order of Mr. Justice Harlan Extending Petitioners' Time for Filing Cross-Petition for Certiorari

SUPREME COURT OF OF THE UNITED STATES

No. , October Term, 1958

AMERICAN-FOREIGN STEAMSHIP CORPORATION, ET AL.,
Petitioners,

v.

THE UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

August 24th, 1959.

(s) JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States

Dated this 10th
day of June, 1959.

APPENDIX B

Charter Hire Accounting Suits (Other Than Those Included in the Instant Petition) Now Pending in United States District Courts and the Dates When the Libels Were Filed

Southern District of New York: American Export Lines Inc., No. A. 191-109 (5-3-57); W. R. Chamberlin & Co., No. 184-186; Eastport Steamship Corp., No. A. 190-175 (2-14-57); Isbrandtsen Co., Inc., No. A. 184-51 (12-21-54); Prudential Steamship Corp., No. A. 192-293 (10-24-57); Dichman, Wright & Pugh, Inc., No. 182-397 (5-27-54).

Eastern District of Massachusetts: Eastern Gas and Fuel Associates, No. A. 55-26-W (5-10-55); Sprague Steamship Corp., No. A. 53-80-F (12-23-53).

District of Delaware: Blidberg Rothchild Co., Inc., No. A. 1758 (2-7-57); Marine Transport Lines, Inc. and Marine Navigation Co., Inc., No. A. 1747 (6-18-56); Pacific-Atlantic Steamship Co., No. A. 1722 (6-22-55) and No. A. 1737 (11-16-56); South Atlantic Steamship Line, No. A. 1735 (5-18-55) and No. A. 1757 (1-23-57); Smith-Johnson Steamship Corp., No. A. 1755 (11-16-56).

District of Maryland: Black Diamond Steamship Corp., No. A. 3885 (11-23-56).

Eastern District of Louisiana: Lykes Bros. Steamship Co., Inc., No. A. 2817 (7-19-55); Mississippi Shipping Co., Inc., No. A. 2845 (9-9-55).

Northern District of California: Coastwise Line, No. A. 27398 (10-5-56); Pacific Far East Line, Inc., No. A. 27170 (7-13-55); Pacific Transport Lines, Inc., No. A. 27101 (4-15-55); Pope & Talbot, No. A. 27161 (7-6-55).

Western District of Washington: American Mail Line, Ltd., No. A. 16231 (8-17-56); James Griffiths & Sons, Inc., No. A. 16218 (7-11-56); Olympic Steamship Co., Inc., No. A. 16233 (8-24-56); States Steamship Co., No. A. 7702 (8-23-56).

APPENDIX C

Excerpt Relating to Clause 13 From Respondent's Brief (pp. 14-15) in South Atlantic Steamship Line, Inc. v. United States, Admiralty No. 1757, District Court of Delaware

Article 7 of the first cause of libel No. 1757 differs, however, in adding a special claim that, contrary to its regulations, respondent, after operations had begun, imposed an arbitrary ceiling of $150 per vessel per day on the amount of libelant's fair and reasonable overhead expenses allocable to operations under the charter (as opposed to and in addition to any actual expenses relating to operating the chartered vessels). This claim, although obscurely alleged, does not involve violation of the statutes, but obviously refers to a mere matter of acceptance of libelant's cost accounting adjustments for reasonable overhead "under the agreement" itself and thus does not accrue until adjustment on final audit. It relates to an accounting requirement with reference to operations involving the MSTS charter, where, in fact, libelants were collecting time charter hire of $1,800 a day from the Navy Department for use of the whole vessel, that no more than $150 daily could be allocated by charterers as the part of their overall overhead chargeable to MSTS charter operations without their submitting detailed evidence as to the items and accounting methods for their allocation which were followed by the steamship companies in distributing their total overhead amongst their various types of operation. (See Appendix F, attached to this brief). It thus differs entirely from libelant's claims for statute violation and appears not to be dismissable, but to form correctly a part of South Atlantic's next or third cause of libel No. 1757.

This third cause of South Atlantic is for overpayments of $16,432.92 "under respondent's regulations." This cause of action (Arts. 21-22), like the $150 a day overhead ceiling (Art. 7), in effect merely alleges that accepting the legality of the Government's contract and regula-

tions such an amount is owing to South Atlantic upon making the necessary accounting adjustments on the final audit.[1] While Article 7 and this third cause contain no allegations of fact and may not state any claims, the accountings submitted by libelant show they are for accounting adjustments within the framework of the charter and are plainly not otherwise subject to respondent's exceptions and exceptive allegations. Accordingly we do not seek their dismissal. They illustrate the "adjustments" on final audit under the agreement to which Clause 13 and the regulations referred as remaining open until final audit.

[1] For the complexities of these adjustments under the agreement see esp. Supp. 21 (Pt. III C, and IV B, pp. 5-8, 10-15) relating to "Allocation among operations under bareboat charter agreements and 'other operations.'"

APPENDIX D

Relevant Clauses of the Charter

CLAUSE 2. (b) Subject to the foregoing provisions as to underwater parts in the event dry-docking is postponed, and except as to items noted on the delivery survey report as defective, the delivery of the Vessel by the Owner and the acceptance thereof by the Charterer shall constitute full performance by the Owner of all the Owner's obligations under Clause 1, and thereafter the Charterer shall not be entitled to make or assert any claim against the Owner on account of any agreements, representations or warranties, expressed or implied, with respect to the condition of the Vessel; provided, however, that the Owner shall nevertheless be responsible for the cost and time of repairs or renewals occasioned by latent defects in the Vessel, its machinery or appurtenances or defects due to locked in stresses in the Vessel existing at the time of delivery, not recoverable under the terms and conditions of the American Hull form of policy (American Institute of Marine Underwriters 7/1/41) containing no deductible average clause. For the purposes of this clause and of the Charter the delivery survey held for the immediately preceding WARSHIPDEMISEOUT form shall be deemed to be the delivery survey under this Charter.

CLAUSE 4. *Inventory.* A complete inventory of the Vessel's entire outfit, equipment, furniture, furnishings, appliances, spare and replacement parts and of all unbroached consumable stores, slop chest and fuel on board shall be jointly taken at the time of delivery, and mutually agreed upon as to items, by representatives of the Charterer and the Owner, and a similar inventory shall be taken and mutually agreed upon at the time of redelivery. The parties may agree, however, to accept any suitable prior inventory which may have been taken before the delivery of the Vessel under this Agreement, either on the occasion of the redelivery of the Vessel from a general agency agreement with the Owner, or otherwise.

CLAUSE 5. *Consumable stores and fuel.* The Charterer shall accept and pay for all unbroached consumable stores and fuel on board at the time of delivery (unless the vessel was under WARSHIPDEMISEOUT 203 form of charter entered into between the parties) and the Owner shall accept and pay for all unbroached consumable stores (with the exception of perishable stores, broached or unbroached, and slop chests, in the event the Vessel is redelivered at a port regularly serviced by the Charterer or at the port of redelivery provided for in Clause G of Part I hereof) and fuel on board (but not in excess of vessel's normal requirements in accordance with good operating practice), at the time of redelivery at the market prices current at the ports and times of delivery and of redelivery, respectively. "Consumable stores" within the meaning of this agreement shall mean all consumable and subsistence stores, and returnable containers (but not expendable equipment, scrap and junk) listed in the United States Maritime Commission Voyage Stores Reports, Forms 7915A, 7916A, 7918A, and 7919A (Revised Forms 1939), and slop chests.

CLAUSE 6. *Use of equipment.* The Charterer shall have the use of all outfit, equipment, furniture, furnishings, appliances, spare and replacement parts on board the Vessel at the time of delivery under this Agreement or any immediately preceding WARSHIPDEMISEOUT 203 form of charter between the parties, without extra cost and the same shall be returned to the Owner on redelivery in the same good order and condition as when received, ordinary wear and tear excepted. Any such items damaged or so worn in service as to be unfit for use (unless through ordinary wear and tear) or lost or destroyed shall be replaced or made good by the Charterer in kind at or before redelivery, or at Owner's option, the Charterer shall pay for said items at the current market prices at the port and time of redelivery. Any coverages accepted by the Owner shall be paid for at the current market prices at the port and time of redelivery.

CLAUSE 12. *Basic Charter Hire.* The Charterer shall pay to the Owner the basic charter hire at the monthly rate provided for in Part I hereof from the day and hour of delivery of the Vessels until and including the day and hour of redelivery to the Owner pursuant to the terms of this Agreement; or if any Vessel shall be lost, hire shall continue until the time of her loss, if known, or if the time of loss be uncertain then up to and including the time last heard from. Payment of such basic charter hire shall be made to the Owner at Washington, D. C., on delivery of the Vessel for the remainder of the calendar month in which delivery is made, and thereafter monthly in advance on the first day of each month.

CLAUSE 13. *Additional Charter Hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of

$100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner; provided however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payment will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

Clause 14. *Termination.* Either the Owner or the Charterer may terminate the period of use of any of the vessels by giving written notice to the other party at least fifteen (15) days prior to the termination of any voyage hereunder, in which event the vessel shall be redelivered at the port of redelivery provided for in Clause G of Part I hereof upon termination of the voyage during which such notice is given.

Clause 15. *Redelivery of Vessel.* The Vessels shall be redelivered to the Owner (unless lost) pursuant to the terms of this Agreement in the same or as good order, condition and class as that in which they were delivered, unless the lack of good order, condition and class is due solely to ordinary wear and tear. At the redelivery survey provided for in Clause 2, surveyors representing both

the Charterer and the Owner, or a surveyor satisfactory to both sides, shall be present, who shall determine and state the repairs or work necessary to place the Vessel on the date of redelivery in the condition and class required in this paragraph which findings shall include all repairs or work (as distinguished from postponed annual or periodical surveys) required by outstanding classification or marine inspection requirements of the Coast Guard, Treasury Department, in effect as of date of delivery to place her in such condition. The Charterer, before redelivery, shall make all such repairs and do all such work so found to be necessary at its expense and time, or at Owner's option, the Charterer shall on Owner's request discharge such obligation by payment to the Owner of an amount sufficient to place the Vessel in such condition and class and to provide for the foregoing work and repairs at the prices current at the time of redelivery, which amount shall also include compensation at the rate of basic hire payable under this Agreement for the time reasonably required under then existing conditions to complete such work or repairs and compensation for other expenses (including insurance) incident to such work or repairs or which would have been borne by the Charterer if the repairs had been effected prior to redelivery. The Charterer shall not be required to make any repairs or to satisfy any classification or marine inspection requirements of the Coast Guard, Treasury Department, which were for Owner's account under Clause 2 of this Agreement but if such repairs were made or such requirements were satisfied after delivery under this Agreement and paid for by the Owner, they shall be considered as having been made at the time of delivery for the purpose of determining the Charterer's obligations under this Clause 15. In the case of any vessel which was under an immediately preceding WARSHIPDEMISEOUT 203 form of charter entered into by the War Shipping Administration and the Charterer the date of delivery referred to in this clause shall be deemed to be the date of delivery under such prior charter.